***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 74-1429

*To be argued by*
JEFFREY C. HOFFMAN

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# United States Court of Appeals
## FOR THE SECOND CIRCUIT

**Docket No. 74-1429**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

CLARENCE JACKSON,

*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## APPELLANT'S BRIEF

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### Preliminary Statement

This is an appeal from the final judgment of conviction of the United States District Court for the Eastern District of New York (Bartels, *J.*) entered on March 29, 1974 after a jury trial convicting the defendant-appellant Clarence Jackson, hereinafter referred to as the defendant, for violation of Title 18, United States Code, Section 1623 in that he knowingly and intentionally made a false material declaration before a special grand jury on December 13, 1972.

The defendant was sentenced to a prison term of three years. The defendant is presently on bail pending appeal.

## Statement of the Issues Presented for Review

1. Did the government establish that the statement in question was material as required by law?

2. Did the Court err in preventing defense counsel from introducing additional grand jury testimony?

3. Did the prosecutor's summation which included numerous prejudicial remarks and a direct reference to the failure of the defendant to take the stand constitute plain error under Rule 52(b) of the Federal Rules of Criminal Procedure?

4. Was the imposition of a three year prison term excessive under the facts of this case?

## Statement of Facts

### 1. The Government's Case

In its efforts to show that the defendant knowingly and intentionally made a false material declaration before a grand jury, the government, in addition to witnesses concerning the actual testimony of the defendant, called various law enforcement officials who gave their versions of the events of May 24, 1972.

The government's first two witnesses were Miss Lillian Cole and Miss Elizabeth Ng, both of whose testimony was stipulated to. Miss Cole, who was the forelady of the grand jury, stated that she had administered the oath to the defendant Clarence Jackson on two occasions: October 25, 1972 and December 13, 1972; that there was a quorum present, and that Clarence Jackson had been granted immunity in this narcotics investigation. Miss Ng, who is a court stenographer, stated that she had recorded the minutes of December 13, 1972 before the grand jury.

The main witness for the government was Patrolman John Ali, Shield No. 7938, who was a narcotics undercover officer for the New York City Police Department. Patrolman Ali testified to various meetings at different locations with the defendant Clarence Jackson, such meetings centering about a proposed narcotics transaction. The witness testified that the first meeting that he had with the defendant was on May 23, 1972 at 146th Street and Eighth Avenue. Subsequently, on May 24, 1972 Patrolman Ali went to the Flash Inn, located around 155th Street and McCombe Road in upper Manhattan. Shortly after nine o'clock the defendant came in, they had a drink, and he (Patrolman Ali) and the defendant went into the men's room, where they discussed a narcotics transaction. Patrolman Ali further testified that shortly thereafter he met with the defendant at 150th Street and Bradhurst Avenue in a little park, and later met with a representative of the defendant at the Loew's Theatre at 125th Street. Thereafter Patrolman Ali and the defendant went to the Gold Lounge at 123rd Street and Seventh Avenue. On May 25, 1972 at a phone booth located at 125th Street and Seventh Avenue, the defendant returned a sum of money to Patrolman Ali. On cross-examination, the witness testified that he took regular notes, transcribing them usually a day or so later, and that he used those notes to refresh his recollection of the events which had taken place months before (T.M. 55-58).

Patrolman John Alexander, Shield No. 24954, an undercover New York City Police Officer, testified that $28,000 was provided him by official sources and that he was told to meet Patrolman Ali and a certain confidential informant. On May 24, 1972, he was outside of the Flash Inn in an automobile and from that point of observation, he saw the defendant enter the Flash Inn. Subsequently, Patrolman Alexander gave Patrolman Ali $28,000 and subsequently proceeded to the Loew's Theatre on 125th Street and then to the Gold Lounge on Seventh Avenue. On cross-examina-

tion Patrolman Alexander stated that he had made notes concerning the events and that these notes were entered approximately twenty minutes after the events. He could not recall when he spoke to the Assistant United States Attorney unless he was able to refer to his activity sheet. Patrolman Alexander stated that he used his notes to refresh his recollection (T.M. 92-94).

The testimony of the next two government witnesses, Patrolman James Mongiello and Patrolman Robert Carter, Shield No. 2033, was stipulated to by defense counsel. Essentially, if called they would testify that by their observations of the Flash Inn on May 24, the defendant was present in that location at that time.

Sergeant Frederick Watts, Shield No. 917 of the New York City Police Department, testified that he was present in the Flash Inn on May 24 and that he saw the defendant and Patrolman John Ali enter the men's room. On cross-examination, Sergeant Watts stated that he made notes of all the events in question and used those notes together with his activity sheets to refresh his recollection (T.M. 105-107). At the conclusion of Sergeant Watts' testimony, the government rested its case.

## 2. The Defendant's Case

The defendant called no witnesses, nor did he testify in his own behalf. At the close of the government's case, the defense attempted to introduce into evidence the grand jury testimony surrounding the alleged perjurious testimony (T.M. 109 et seq.). Such motion was denied by the Court.

# ARGUMENT

## POINT I

### The Government failed to establish that the statement was material as required by law.

On December 13, 1972, the defendant Clarence Jackson testified before a Federal Grand Jury, which was inquiring of possible violations of the Federal narcotics law. The defendant testified at great length to his knowledge or lack of knowledge of known narcotics figures, his income and sources of income, his associations and places of association, and his involvement in the trafficking of narcotics. At the conclusion of some 125 pages of testimony, the Government sought and obtained an indictment against the defendant for perjury (Title 18, United States Code, Section 1623) in that he denied that certain negotiations relative to narcotics trafficking had taken place in a tavern known as the *Flash Inn.*

There can be no doubt that the particular negotiation for a sale of a kilogram of heroin for some $28,000 was fully testified to by the defendant Jackson, in addition to numerous other matters pertinent to the Grand Jury investigation. It is obvious by the lack of any other indictment or any other counts in the present indictment that the defendant Jackson's testimony was concededly truthful in all aspects, save the alleged incident in the Flash Inn on May 24, 1972. While the Government has couched its indictment in terms "that it was material for the Grand Jury to determine whether or not the defendant Clarence Jackson had ever offered to sell heroin to anyone", nonetheless, the case proceeded solely on the issue of whether or not any portion of the negotiations had taken place in the Flash Inn.

Both the testimony of the defendant and that of the government's witnesses at trial show that in fact there had been negotiations for the sale of a quantity of narcotics and that portions of these negotiations had taken place on 146th Street and Eighth Avenue, at 150th Street and Bradhurst Avenue (a park), at Loew's Theatre on 125th Street, at the Gold Lounge on 123rd Street and Seventh Avenue, and in a phone booth on 125th Street and Seventh Avenue. Again, the only point of dispute being whether any portion of the negotiations had occurred at the Flash Inn on 155th Street and McCombe Avenue.

The Government has stated that the test of the materiality of any false testimony is set out in *United States* v. *Stone,* 429 F.2d 138 (C.A. 2, 1970). The test, concisely stated, is whether or not the false testimony has "the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation." A further clarification of the test of materiality was given in *United States* v. *Freedman,* 445 F.2d 1220 (C.A. 2, 1971). There, at pages 1226-7, the Court stated:

> "Implicit in that holding, and in succeeding cases, is the recognition that the 'further investigation' of which they speak must have some probative value connected with the scope of the inquiry. That is to say, in order for a knowingly false statement to be material within the purview of § 1621, it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred. Proof of this was absent at trial, and we repeat once again that the materiality of a false statement must be proved to sustain a perjury conviction."

Clearly, testimony is not material if the accurate answer is of no probative importance, and the inaccurate answer

would not impede, influence or dissuade the Grand Jury from pursuing its investigation. As intimated in Second Circuit opinions and concurred in other circuits, the false testimony must be capable of influencing the tribunal on the issue before it. *United States* v. *Whitlock,* 456 F.2d 1230 (C.A. 10, 1972). The Government must necessarily show that it could have assisted the Grand Jury, had the testimony been given truthfully, and that whether in fact the falsity of the statement impeded the investigation. *United States* v. *Mancuso,* 485 F.2d 275 (C.A. 2, 1973), at page 281.

The Government in its argument has consistently alluded to the materiality of the testimony incorporated in the indictment by claiming that it was essential to a most important phase of the Grand Jury investigation, namely, the locating of the source of the narcotics. There can be no doubt that one of the most important phases of a narcotics investigation is the uncovering of the source of supply. However, one must analyze the questions propounded to the defendant in reaching a determination as to whether the "source" was an individual or a place. Throughout the questioning of the defendant, the Assistant United States Attorney sought to elicit information concerning how the defendant proposed to obtain the heroin. The Assistant United States Attorney inquired whether or not it would be directly obtained from an Italian, the defendant's father, or several other individuals known to be engaged in narcotics trafficking. All of these inquiries were apparently truthfully answered. The logical question which emerges from a reading of all of the testimony is: how was the Grand Jury impeded or dissuaded by the testimony concerning the Flash Inn; or, of what probative value was the testimony concerning the Flash Inn? Since there was testimony concerning portions of the negotiations held on a public street, at a telephone booth, at a park, at a movie theater, and at another bar, does the Government seriously contend that if the defendant were to fail to remember any of the number of locations where this business transpired,

that the forgotten location would become material and hence the basis for a perjury indictment? Would it impede or hinder the Grand Jury if they did not know the number of the street, the location of the telephone booth, the location of the park, or the name of the movie theater? The Government has failed to demonstrate that part of the negotiations of the transaction took place in the Flash Inn for a reason other than an inconsequential one. There has been no evidence introduced that the Flash Inn is any more significant than the Blarney Stone, the White Rose, or the Four Seasons Restaurant. The situs would achieve the status of materiality if it were coupled with a denial of any and all meetings and negotiations with a party, where the contradictory evidence would show the meetings and negotiations taking place at that situs. But even here, the essential point is the negotiations. In our present case, the defendant fully testified to his involvement in the transaction and to the numerous locations where negotiations took place. To say that the Flash Inn is material because it was omitted, by design or faulty memory, without the introduction of any other evidence indicating its materiality, is erroneous and calls upon the Court to render its decision based on pure speculation and surmise.

## POINT II

### The Court erred in preventing defense counsel from introducing additional grand jury testimony.

It is axiomatic in Anglo-American jurisprudence that a jury should be permitted to hear and examine all relevant evidence which shed light on the guilt or innocence of an accused. To preclude from the hearing of the jury facts which may well be determinative of their verdict is to abort the very purpose for which the panel has been sworn.

During the course of the trial, defense counsel continuously urged the admission of the testimony surrounding

that portion contained in the indictment. His grounds, quite understandably, were to show the jury that the defendant, if he mis-stated the events of May 24, 1972, did not do so intentionally, and had in fact truthfully responded to myriad questions concerning events both prior and subsequent to the date in question (T.M. 109 et seq.). The Court, in response to the persistent offer made by defense counsel, categorized the additional evidence sought to be introduced as confusing (T.M. 116) and otherwise inadmissible (T.M. 138).

The admission of the facts concerning the 125 pages of grand jury testimony becomes even more relevant and probative when an analysis is made of the very testimony which the government seeks to use as a basis for the indictment and conviction. On page 2 of the indictment, the first six questions set forth indicate that the interrogator of the defendant propounded questions which were ambiguous, inaccurate and calculated to promote the very confusion which follows:

> "Q. Did you first meet with them at the Flash Inn on McCombe Avenue? A. No, I did not.
>
> Q. Are you saying that on that day, on May 24, 1972, you never met with anybody and discussed with anybody the sale of heroin in the *Flash Inn*? A. No, I did not.
>
> Q. Are you very sure of that? A. I'm positive of that."

The first question elicited a clear response from the defendant: "No I did not." The evidence introduced by the government clearly showed that the defendant did not *first meet* with "them" at the Flash Inn on McCombe Avenue. To the contrary, the evidence indicated that the "first meet" was at 146th Street and Eighth Avenue (T.M. 36). The second question propounded to the defendant is a classic example of improper cross-examination. The question con-

tains irreconcilable mis-statements of fact. The question begins: "Are you saying that on that day, . . .". Clearly, "that day" could only refer to the previous question which inquired of whether or not the "first meet" was held at the Flash Inn on McCombe Avenue. The second question continues: "On May 24, 1972 . . .", but evidence from the government's own witnesses indicates that the "first meet" was on May 23, 1972. It is especially noteworthy that the defendant's definitive negative response is the only time that he clearly denies any discussion in the Flash Inn. But, is he denying that on the day they had the *first meet* (May 23, 1972) there were no discussions in the Flash Inn, or is he, as the government alleges, denying that discussions were held on May 24, 1972 at the Flash Inn?

Where an interrogator uses ambiguous and inaccurate questions, the responses he receives cannot be the basis for a perjury indictment. At the risk of being didactic, the following is a perfect illustration of precisely how, an interrogator concocts an unanswerable question:

> "Q. Did you first meet with them on New Year's Day? A. No I did not.
>
> Q. Are you saying that on that day, January 3rd, you never met with them? A. No I did not."

While the party being questioned has attempted to put forth a truthful answer, in fact no answer to the question is possible. Inasmuch as January 3rd obviously is not New Year's day, so too in the set of questions contained in the indictment, the "first meet" was not made on May 24, 1972.

An indictment for perjury can never be based on confusion or on questions lifted out of context. It is the duty of the examiner to bring the questions to the mark and by proper inquiry secure a meaningful response from the examinee. *United States* v. *Van Liew,* 321 F.2d 674 (C.A. 5, 1963; *Bronston* v. *United States,* 93 S. Ct. 595 (1973).

As the government conceded in its brief before the United States Supreme Court in *Bronston* v. *United States* (*supra*) :

> "A question will not provide the foundation for a perjury conviction if it suffers from either of two vices arising from ambiguity—(1) that it employs terminology that is vague or confusing; or (2) that it is so worded that it may be asking either of *two different questions* [emphasis added] *and* the defendant's answer is truthful as to one of them. Illustrations of the former possibility are *United States* v. *Lattimore,* 127 F. Supp. 405 (D.D.C.), affirmed per curiam, 232 F.2d 334 (C.A.D.C.), and *United States* v. *Cobert,* 227 F. Supp. 915 (S.D. Cal.)."

In our instant case, the defendant suffered both from the confusion produced by the erratic questions asked and by being prevented from illustrating the totality of circumstance surrounding the question. The defendant, a man of limited intelligence, was then subjected to further questions. These questions invariably were responded to by indications that he (the defendant) could not remember. In fact, although carefully eliminated from the indictment, the defendant indicated (Grand Jury Minutes, p. 108) that he might have been in the Flash Inn and had such discussions, but that he just didn't remember. While the question of materiality is one for the Court to determine, there is always a second question of materiality. This second question is one which must be decided by the jury. Since the jury must determine from the evidence that a defendant's faulty memory is or is not the product of shrewdness, they must necessarily find a materiality in the event which would lead a reasonable man to recall the event. Therefore, evidence which relegates the incident at the Flash Inn to a minor, unimportant or merely nondescript link in a lengthy chain is of great import and should not be excluded.

When one considers that the questions contained in the indictment were begun by an ambiguous and erratic inquiry

to which the only explicitly negative response was made, that the defendant's grand jury testimony (125 pages) was otherwise without any taint, and that the defendant at one point conceded the possibility of the events of May 24, 1972, the defense counsel should clearly have been permitted to place the entire scenario before the triers of the facts.

## POINT III

### The prosecutor's summation contained plain error which seriously affected the defendant's rights by commenting on the failure of the defendant to testify and making several prejudicial references.

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."
>
> *Berger* v. *United States,* 55 S. Ct. 629, 633 (1935).

In reversing the Court of Appeals for the Second Circuit (73 F.2d 278), the United States Supreme Court set forth standards which it never should have had to. The Supreme Court's criticism of the conduct of the prosecuting attorney was most severe, as it should have been. The admonition, however, appears to go unheeded, for recently the Court of Appeals for the Second Circuit has been called upon to chastise prosecutorial misconduct of various types. *United States* v. *Fried,* 486 F.2d 201; *United States* v. *Santana; United States* v. *Drummond,* 481 F.2d 62; *United States* v. *LaSorsa,* 480 F.2d 522; *United States* v. *Fernandez,* 480 F.2d 726; *United States* v. *Miller,* 478 F.2d 1315; and *United States* v. *Pfingst,* 477 F.2d 177.

In our instant case the prosecutor's summation, in addition to a direct reference to the failure of the defendant to testify, was replete with personal references and an attempt to place before the jury the very facet of the case which was most prejudicial and totally irrelevant to the issue at hand. At the very outset of the prosecutor's summation, the Court was forced to admonish the prosecutor for indulging in personal references (T.M. 157). This judicial warning, although quite clear, had to be repeated again (T.M. 162, bottom of page) and again (T.M. 163, bottom of page). The injection of personal references by a prosecutor is most improper. *United States* v. *LaSorsa, supra; United States* v. *Drummond, supra.* It is not the defendant's contention that every comment by a prosecutor which is ill conceived requires reversal (*United States* v. *Miller, supra*), but where there is a continuous repetition of the very same objectionable conduct, prejudice is sure to enure. It has been oft stated that, "prejudices which are so easily aroused are not so readily expunged." *State* v. *Stago,* 312 P.2d 160, 161 (1957).

Perhaps the most fundamental principle in our system of justice is contained in the Fifth Amendment of the United States Constitution. Part of the right of a person to remain silent and not to be required to testify against himself is the right to be free from suffering prejudice by his exercise of this right. It is quite clear that to fully protect the individual, a prosecutor cannot comment upon the defendant's failure to take the witness stand. During his summation, the prosecutor, while recounting the testimony of Patrolman Ali, stated: "Did you hear one iota of evidence to contradict Patrolman Ali's testimony?" (T.M. 161). It is clear from the facts of this case that the only person available to contradict the testimony of Patrolman Ali was the defendant himself, Clarence Jackson (T.M. 39-41). Such a statement in a short and relatively simple trial such as this has an even more devastating effect upon a jury's deliberations, for it would not be lost amidst the

involvements that arise in lengthier litigation. Nor can the prosecutor's improper comment be dismissed as the by-product of a long and complicated case. *United States* v. *Pfingst, supra.* Further, the evidence in the instant case was far from overwhelming as discussed in Points I and II.

A comment made by a prosecutor referring to the failure of a defendant to take the witness stand is of constitutional magnitude. And while there may be some constitutional errors in a conviction which in the setting of a particular case are so unimportant and insignificant that they may, consistent with Federal Constitution, be deemed harmless and which will not require automatic reversal of the conviction, to so hold requires that the reviewing court be able to declare a belief that it was harmless beyond a reasonable doubt, and that it did not contribute to the defendant's conviction. *Chapman* v. *California,* 87 S. Ct. 824 (1967). Such comments upon the defendant exercising his right to remain silent invariably give rise to prejudice, particularly where a defendant's credibility is a main issue. *United States* v. *Semensohn,* 421 F.2d 1206 (C.A. 2, 1970). Where the government could have forced a defendant to perform the act commented on, reversal would not be required. *United States* v. *McCarthy,* 473 F.2d 300 (C.A. 2, 1970). But such is not the case here. Most assuredly, the central issue in a perjury trial is credibility.

Despite the fact that during the course of the trial and out of the presence of the jury the judge made it clear that he was not going to permit the trial to become a narcotics case, the prosecutor blatantly urged the jury to remember that this really was a narcotics case (T.M. 163). As he stated in his summation:

> "That meeting on May 24 was not a social gathering; going to mother's house for a turkey dinner or a meeting at the Knights of Columbus for a dance. It was not a social occasion. It was not the same as a social gathering. It was an association for delivery of a kilogram of heroin."

While the judge attempted to cure this prejudicial outburst in his charge (T.M. 183), the damage had been done, and as Mr. Justice Jackson said:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."
>
> *Krulewitch* v. *United States,* 336 U.S. 440, 454.

See also, *United States* v. *Semensohn, supra.*

While no objection was taken by defense counsel during the prosecutor's summation, the matter still comes within the purview of Rule 52(b) of the Federal Rules of Criminal Procedure—plain error. Here, substantial rights of the defendant were seriously impaired by the numerous improprieties in the prosecutor's summation. Where substantial rights of a defendant are affected by cumulative errors, the Court will act pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure. *United States* v. *Fields,* 466 F.2d 119 (C.A. 2, 1972).

The full impact of the improprieties contained in the prosecutor's closing message to the jury is almost immeasurable. Constantly placing himself and consequently the prestige of his office and the sovereign he represents before the jury in an effort to secure an improper advantage, boldly referring to the defendant's failure to come forward and contradict the government's witnesses, and vociferously appealing to the natural prejudice of the jury against narcotics are conduct not to be dismissed as harmless error.* The import of these inequities is more felt in a short trial, particularly one for perjury where such comments are not lost amidst considerations of evidence stemming from points other than the defendant's immediate

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* For an interesting analysis see Harmless Error: A Doctrine for All Seasons Professor David Trager, *Brooklyn Law Review,* Vol. 39, 1043. Recent developments permit Professor Trager to expound more fully and personally.

person. A perjury trial places the credibility and personality of the defendant squarely before the jury. Any appeal to the prejudice jurors may have against a defendant exercising his Fifth Amendment privilege or attempt to inject an irrelevant issue (narcotics) in an effort to prejudice the defendant is of the utmost importance and as such requires a reversal.

## POINT IV

### The imposition of a three year term of imprisonment was excessive under the facts of this case.

While appellant is fully aware that in the absence of extraordinary factors sentence and its attendant procedures are in the discretion of the trial court [*United States* v. *Warren,* 453 F.2d 738 (C.A. 2, 1972); *United States* v. *Valasquez,* 482 F.2d 139, 142 (C.A. 2, 1973); *United States* v. *Brown,* 479 F.2d 1170, 1172 (C.A. 2, 1973)], it is felt that the circumstances of this case failed to warrant the severe sentence imposed.

The appellant is a young man of 28 years of age who is married and the stepfather of a small child. He lives with his wife and stepchild in their home in New Jersey. Despite his few years, he is not in good health. He is a product of the ghettoes of New York, but has never been convicted of a crime.

In 1910, Winston Churchill, as head of the Home Office of the British government, made a speech in the House of Commons about criminal justice. He talked of the need for decent, humane criminal administration of the criminal laws. He recognized that a nation's attitude towards offenders against its laws is important, not just to the offenders, but to the quality of the nation as a whole. A nation, he felt, which is not compassionate towards its criminals, will be lacking in compassion towards all of its

people. In fact, he observed that the mood and temper of a country in regard to the treatment of crime and criminals is an unfailing test of the quality of a nation's civilization.

Considering the appellant's background, the facts of this case and that this is his first conviction, the appellant should have been given an opportunity to be placed on probation.

## CONCLUSION

**The failure of the government to establish the materiality of the statement made by the defendant requires reversal and a dismissal of the indictment.**

**The ambiguous and confusing questioning, the failure to permit defense counsel to introduce additional Grand Jury testimony, and the improper comments in the prosecutor's summation, would, if considered individually, call for reversal when one considers cumulative effect of these prejudicial factors reversal is required.**

Respectfully submitted,

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